No. 86-750

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
Petitioner,

VS.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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INTRODUCTION

Respondent's brief in opposition highlights how important it is that this Court grant Simpson's petition for a writ of certiorari. That brief demonstrates that the State of California is unaware of basic federal principles of labor law and is unconcerned with the statutory scheme constructed by Congress. This reply will note how Respondent has failed to distinguish *Fort Halifax Packing Company, Inc. v. Marvin W. Ewing*, Case No. 86-1-341 ASX (hereinafter *Fort Halifax*). The reply will also show that Respondent's assumptions are contrary to federal labor law principles and will demonstrate how Respondent's reliance on *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts*, 105 S.Ct. 2380 (1985), is misplaced. Most of Respondent's arguments are ad-

dressed in Simpson's petition for a writ of certiorari. This reply will not repeat those arguments.[1]

ARGUMENT

I

RESPONDENT HAS FAILED TO DISTINGUISH FORT HALIFAX

It is apparent that the National Labor Relations Act issue raised in *Fort Halifax*, a case in which this Court noted probable jurisdiction on November 10, 1986, is virtually identical to the issue raised by Simpson in the instant case. In each case, the state has altered the established bargaining relationship between the employer and the union representing its employees with respect to a mandatory subject of bargaining. In each case, the parties' respective positions regarding the economic item at issue were based on resolution of an entire wage and benefit package and became part and parcel of the parties' overall settlement and agreement. The employers in both cases maintain that federal labor law preempts the state's action.

Respondent attempts to distinguish *Fort Halifax* on the ground that the appellant in that case argued "that the Maine statutory scheme is unconstitutional" whereas Simpson allegedly did not argue that California's intrusion into the bargaining process was "per se" unconstitutional. Respondent's brief in opposition, page 19. Respondent's argument fails to acknowledge the underlying basis of every federal preemption argument. There is no dispute that at every reasonable opportunity afforded to it, Simpson has unequivocally stated its position that the State of California was preempted by the Labor-Management Relations (Taft-Hartley) Act ("LMRA"), as amended, 29 U.S.C. § 157 (1947), from interfering with the collective bargaining agreement in effect between

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[1]Simpson's rule 28.1 list is set forth at page i of its petition for a writ of certiorari.

Simpson and the Union which represents its employees. In its petition for a writ of certiorari, Simpson cited clause 2 of Article VI of the United States Constitution, also known as the "supremacy clause". Petition for a writ of certiorari, page 2. It is axiomatic that each time Simpson raised its claim of preemption that argument was based on the supremacy clause of the United States Constitution. Respondent's contention that Simpson's preemption arguments were based on something other than the supremacy clause is misplaced.

Respondent's second attempt at distinguishing the two cases also must fail. As has been stated, and will be noted hereinafter, safety is *not* and *never has been* a factor in Cal-OSHA's reasoning with respect to who must pay for the shoes in question. See Argument, II.B. and III., *infra.*

II

ACCORDING TO ESTABLISHED FEDERAL LABOR LAW, THE STATE'S ACTIONS IN THIS CASE WERE PREEMPTED

Respondent's arguments are premised upon assumptions which require the rewriting of federal labor law principles.

A. The Collective Bargaining Agreement By And Between Simpson And The Union Requires That Simpson Pay Only A Small Portion Of The Cost Of A Pair Of Shoes.

Respondent complains that the basis for Simpson's position that the collective bargaining agreement required it to pay for only a portion of the cost of a pair of shoes is that this requirement "harks back to a custom and practice which was never the subject of any collective bargaining session". Respondent's brief in opposition, page 6. Simpson has already set forth in great detail the discussions and negotiations which occurred between the Employer and the Union with respect to who would pay for the shoes in question. Petition for a writ of certiorari, pages 4-5. Even assuming, however, that such discussions

did not occur, as this Court has held repeatedly, custom and practice are as much a part of any collective bargaining agreement as are the words printed on the agreement's pages.

In *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 578-580 (1960), this Court stated in this regard as follows:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot fully anticipate . . . The collective agreement covers the whole employment relationship. *It calls into being a new common law — the common law of a particular industry or of a particular plant.* As one observer has put it: '. . . *There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages.* Within the sphere of collective bargaining, the institutional characteristics and *the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.*' (Emphasis added, citations and footnotes omitted.)

See also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 524 (1983) ("[B]ecause of the special nature of a collective-bargaining contract, and the consequent 'law of the shop' which it creates, . . . a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement."); *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 161 (1966) ("In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agree-

ments, as well as the *practice, usage* and *custom* pertaining to all such agreements" (emphasis added)); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (collective bargaining agreement "is not an ordinary contract"); *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914, 920 (5th Cir. 1983) ("It is well-established that § 301 must be broadly construed to encompass any agreement, *written or unwritten, formal or informal,* which functions to preserve harmonious relations between labor and management." (emphasis added)).

Moreover, it is neither this Court's province nor Cal-OSHA's to determine what is and what is not within the collective bargaining agreement. That is solely the task of the parties' chosen arbiter. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). In this case, just such an Arbitrator, Mr. Sam Kagel, was called upon to make that decision, and he clearly and unequivocally stated at page 5 of his Opinion and Decision, as follows:

> *The past practice* relative to some payment for safety shoes *is of such duration* that *it has in effect become part of the agreement between the parties* and this is specifically so in that the company increased the amount of reimbursement as a result of the direct request of the union. (emphasis added.)[2]

Thus, one of the key bases for Respondent's arguments is erroneous as a matter of federal law and belied by Mr. Kagel's Decision.

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[2]Moreover, contrary to the erroneous claims of the Respondent, this decision was rendered when the wearing of safety shoes was mandatory in the Employer's finishing department. Indeed, the grievance which resulted in the Arbitration was filed *because of* the Employer's decision to make the wearing of safety shoes mandatory there. Compare Respondent's brief in reply, page 3 with pages 4, 7.

B. The State Of California's Notions With Respect To How Collective Bargaining Should Proceed Highlight The Soundness Of Simpson's Petition For A Writ Of Certiorari.

Respondent's notions of how collective bargaining should work lead it to claim that bargaining about the cost of the shoes in question "must begin with the employer acknowledging the concommitant duty to provide and pay for required safety devices. Absent such an acknowledgement on the employer's part, there could be no *meaningful* bargaining away or waiver of such a statutory entitlement." Respondent's brief in opposition, page 8 (emphasis added). Respondent continues by stating that the absence of such a precondition not only makes the negotiating not "meaningful" but, in addition, puts the Union "in the position of imploring or begging the employer to fulfill its statutory duties. . . ." *Id.*

Once again, Respondent's argument is based on assumptions which, simply stated, impede federal law and interfere with the collective bargaining process. One secret to the success of collective bargaining in the fifty years since the enactment of the Wagner Act has been that, generally speaking, once negotiations have begun, Congress and the National Labor Relations Board (hereinafter also the "NLRB" or "Board") have left the parties to their own devices to work out an agreement or not as befits their relative bargaining power. It has not been Congress' or the Board's concern who it is who goes "begging" or "imploring" on one issue or the other. Neither Congress nor the Board has erected sterile or rigid rules for the bargaining process, or the requirement of "acknowledgments". Neither Congress nor the Board has been concerned about "meaningful" negotiations, whatever that means, so long as the parties meet and bargain in good faith. More important, *it is only Congress* which has the right to alter the bargaining process. Cal-OSHA has neither the right nor the expertise to suggest how negotiations should proceed or what would make them more "meaningful".

Furthermore, Respondent undercuts its own argument by emphasizing the importance of the bargaining process, for that is a matter solely within the jurisdiction of Congress to address. Neither Cal-OSHA nor the court below is saying that Simpson and the Union were precluded from agreeing that Simpson's employees, and not Simpson, would pay for the shoes in question. To the contrary, Respondent implies that would be perfectly acceptable to it, if only its notion of proper labor negotiations were permitted to take the place of Congress. Just as Cal-OSHA's vision of "custom and practice" must give way to the federal law, so must its notions of what it believes to be "meaningful" bargaining. Federal law does not, and should not, permit such interference by state agencies or courts.

Finally, Respondent's position belies its claim that safety is, or ever was, a factor in the issue of who is to pay for the shoes. *If safety were the issue, then Cal-OSHA could not tolerate employees paying for their shoes no matter how that end result occurred.* But it is not the end result that concerns Respondent. Rather, it is Respondent's belief it can improve upon the federal bargaining process. Respondent is not attempting to enforce a safety-related issue; it is attempting to interfere with the bargaining process, it is attempting to alter the parties' economic package and it is attempting to add rules and restrictions to the bargaining process which only Congress can authorize by and through the National Labor Relations Board.

The State of California is meddling in areas and with matters without the right, expertise or justification to do so. Nothing makes this clearer than its positions before this Court.

III

SAFETY IS NOT AND NEVER HAS BEEN AN ISSUE IN THIS CASE

As has been maintained by Simpson throughout, and as is noted *supra,* safety is not and has not been the basis for

Cal-OSHA's position or the alleged justification for it. *See* petition for a writ of certiorari, page 12, n.5, pages 12-13. Simpson does not dispute that safety shoes should be worn by all employees covered by the Order to Take Special Action.[3] Cal-OSHA's after the fact attempt to justify its position as being safety-related is not supported by the record or by Cal-OSHA's prior litigation position. *Id.* Paying for the shoes in question is a bargaining issue, not a safety-related one.

IV

METROPOLITAN LIFE INSURANCE DOES NOT APPLY TO THIS CASE

This Court, in *Fort Halifax,* rejected Maine's claim that *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts,* 105 S. Ct. 2380 (hereinafter *Metropolitan*), applied to that case. For like reasons, *Metropolitan* does not apply to the instant case.

First, the statute in *Metropolitan* did not act so as to alter a *preexisting* collective bargaining relationship or agreement. The established relationship between the Employer and Union in this case, as determined by the labor Arbitrator who was asked to resolve the issue, makes this case different from *Metropolitan.* Stated another way, assuming *arguendo* the State of California could have required Simpson to pay for the cost of safety shoes when no collective bargaining agreement was in effect, it clearly cannot do so after the economic terms and conditions of its agreement have been established subsequent to good faith collective bargaining.

Second, in *Metropolitan* this Court accepted the state's requirement that group insurance include mental health

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[3]It is true that at one point Simpson claimed that toecaps were as safe as safety shoes. Nevertheless, this position was abandoned early in the litigation and all subsequent arguments regarding the cost of a pair of safety shoes have assumed that safety shoes should be worn by the employees in question. Respondent's contentions to the contrary at footnote 4 are, simply stated, baseless.

care insurance as being legitimate and rational. In this case there is no safety-related or other legitimate state issue. California's stated concerns in this case address how negotiations should proceed or whether the Employer must first "acknowledge" it had a statutory duty before it could "meaningfully" negotiate with respect to the limits of that duty. These are Congressional concerns which go to the heart of the collective bargaining process. They are not rational or legitimate concerns of the State of California.

Third, in *Metropolitan,* the state gave the parties to the collective bargaining process the clear and unfettered choice of providing no insurance, thereby avoiding the effect of the statute. 105 S. Ct. at 2394. In this case, no choice is permitted. The state has held that Simpson's employees must wear the shoes. So long as Simpson has employees, it has no choice but to pay for the shoes, according to Cal-OSHA.

Fourth, *Metropolitan* involves a statute of general application which affected any person purchasing a certain type of insurance. It was not limited to employers and its purpose was not to affect bargaining. The Order to Take Special Action in this case, however, applies to one employer and does affect, and interfere with collective bargaining. Therefore, whereas the statute in *Metropolitan* could be justified as a result of its general, statewide effect, the result of the Order to Take Special Action in this case prevents Cal-OSHA's making any such argument.

Fifth, the statute in *Metropolitan* provided a *minimum standard* for health insurance benefits. *See also Industrial Welfare Commission v. Superior Court,* 27 Cal.3d 69 (1980), and other cases cited by Respondent at pages 8-10 of its brief in opposition. The order in the instant case is not a minimum standard. It requires that Simpson pay *all* of the costs of its employees' safety shoes. Far from

being a minimum standard, it is a state ordered maximum requirement.[4]

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Simpson's prior filings, Simpson's petition for a writ of certiorari should be granted. Cal-OSHA's interference with the bargaining process in this case will undoubtedly lead to exactly the same meddling with respect to other employers in other industries. Moreover, encouraged by their new-found power, bureaucratic institutions across the country will start adding their rules, requirements, touches and glosses to the bargaining process. Employers and unions will be unable to reach agreements, or know when agreements they have reached, even on critical economic issues, will be final and binding. Therefore, this Court must grant Simpson's petition for a writ of certiorari to clarify the limits of state bureaucratic intrusion into the federal collective bargaining process. Employers and unions throughout the country must be assured that their agreements, resulting from hard fought and trying negotiations, will not be undone because a state agency objects to the bargaining process.

Respectfully submitted,

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[4]The suggestion that the IWC case which approved a minimum wage for all employers somehow controls this case is totally unfounded for the reasons previously expressed, and because Cal-OSHA's position does not impose a minimum wage. As previously noted, it also is not safety-related.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1986, I served the within Reply Brief in re: "Simpson Paper Company vs. Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California" in the United States Supreme Court, October Term 1986, No. 86-750;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Michael D. Mason
Division of Occupational Safety and Health
525 Golden Gate Avenue, Room 616
San Francisco, California 94102

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1986, at Los Angeles, California

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